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No. 90-921

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In the Supreme Court of the United States

OCTOBER TERM, 1990

LINDA B. DORFMONT, PETITIONER

v.

JAMES P. BROWN, DIRECTOR,
DEPARTMENT OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the revocation of petitioner's security clearance is subject to judicial review.

2. Whether petitioner has a liberty or property interest in retaining a security clearance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 913 F.2d 1399. The judgment of the district court (Pet. App. A17-A18) is unreported. The administrative decisions at issue (Pet. App. B) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1990. The petition for writ of certiorari was filed on December 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed as a systems engineer in the Radar Systems Group at Hughes Aircraft Company, a government defense contractor. In connection with her employment, she held a security clearance issued by the Department of Defense. During 1983, petitioner met and became friends with Lubemir Peichev, a Bulgarian national who was serving a life sentence in the Terminal Island Federal Correction Institution for his part in an attempted airline hijacking for ransom. Pet. App. B4-B5.

During the spring of 1984, Hughes gave petitioner the responsibility to process data as part of a program to predict failure rates of radar system components produced by Hughes. Completion of the project required proficiency in the fortran computer language. Petitioner was not a qualified fortran programer, and was unable to arrange for assistance from Hughes employees or from qualified outside sources. Petitioner then turned to Peichev, who had acquired degrees in business administration and computer science while in prison. Petitioner asked Peichev to assist her in translating Hughes' information into fortran. Peichev agreed, and petitioner mailed three packets of company data to Peichev at his prison. Prison officials, however, intercepted two of three packets and advised Hughes. An internal investigation ensued, and petitioner was disciplined for violating company rules regarding the dissemination of company information. Pet. App. B5-B7.

2. On July 24, 1985, the Department of Defense's Directorate for Industrial Security Clearance Review (DISCR) issued petitioner a Statement of Reasons stating that it could not make the preliminary finding that it was "clearly consistent with the national interest" to continue her security clearance. Pet. App. B1, citing Department of Defense (DoD) Directive 5220.6; see 32 C.F.R. 155.7. The Statement

of Reasons alleged that petitioner had engaged in "conduct of a reckless nature indicating poor judgment, unreliability or untrustworthiness as to suggest that [petitioner] might fail to safeguard classified information," and, in particular, that petitioner had provided to Peichev "company sensitive defense contract data." The Statement recommended referral to a Hearing Examiner to determine whether her security clearance should be revoked.[1] Pet. App. B1-B2, B17.

Following a four-day hearing, the Hearing Examiner concluded that petitioner had disclosed company sensitive information that, although not officially classified, nevertheless "was of potential use in defense contracts involving Hughes and the Federal Government." The Examiner rejected petitioner's claim that she had permission to disclose the data to Peichev, finding that she had not fully informed her supervisor of that decision and that it was "inherently unreasonable and unsound" to release information into a "prison environment where the potential for abuse of these materials by others was virtually unlimited." In light of those findings, the Examiner concluded that petitioner had used "appallingly poor judgment" in sending company information to Peichev, and he noted that "[t]he nation's security can not be entrusted to those who exercise poor judgment regarding the use and dissemination of information within their possession." The Examiner also concluded that petitioner's lapse could not be explained as an isolated incident, nor was its seriousness offset by mitigating factors. Finally, the Examiner pointed out that petitioner's "protracted

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[1] The Statement of Reasons also charged petitioner with a stated intent to develop a "closer relationship" with Peichev. Pet. App. B2. The Hearing Examiner found that the facts supported that charge, but that, since no relationship had developed, it was without security significance. *Id.* at B14. The Department of Defense Appeal Board agreed. *Id.* at B19.

reluctance to admit poor judgment" indicated that she was not rehabilitated. Accordingly, he concluded that "it is not clearly consistent with the national interest to grant or continue a security clearance" to petitioner. Pet. App. B2, B13-B16.

Petitioner appealed to the Department of Defense Appeal Board, which concluded that the Hearing Examiner had erred in excluding certain evidence and in failing to give an adequate explanation for certain credibility determinations. The Appeal Board remanded to the Hearing Examiner for reconsideration. Pet. App. B17-B24. On reconsideration, the Examiner considered the previously excluded evidence and gave detailed explanations for his credibility determinations. Reviewing the entire record, the Examiner reaffirmed his original conclusion that petitioner's security clearance was not clearly consistent with the national interest. *Id.* at B25-B37. The Appeal Board affirmed that determination, finding that it was supported by the evidence and reflected a correct application of the controlling principles. *Id.* at B41-B49.

3. Petitioner then filed suit in the United States District Court for the Central District of California seeking an injunction against the revocation of her security clearance. She alleged that she had been denied due process in that her conduct did not warrant revocation; the Examiner's findings were contrary to the evidence; the Examiner must have been biased because he disbelieved petitioner; his conclusions were contrary to DoD Directive 5220.6; the Examiner and the Appeal Board had abused their discretion; and the criteria for revocation had no reasonable nexus to security objectives. She also alleged that she was denied due process because the Appeal Board lacked authority to reverse the Examiner s decision (as opposed to remanding for further consideration), and because the criteria governing the revocation were vague and arbitrary. Pet. App. A7-A8. The

district court dismissed the case, stating that it had no jurisdiction to review security clearance determinations. *Id.* at A17-A18.

4. The court of appeals affirmed. As an initial matter, the court noted that because "[t]he decision to grant or revoke a security clearance is committed to the discretion of the President by law," the courts "cannot review the merits of the [Defense] [D]epartment's decision to revoke [petitioner's] security clearance." Pet. App. A7. Although petitioner purported to challenge her revocation on due process grounds, the court characterized most of petitioner's claims as attacks on the merits of the revocation decision. Those contentions, the court explained, could not be reviewed by the judiciary. Pet. App. A6-A8, citing *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988), and *Webster* v. *Doe*, 486 U.S. 592 (1988).

The court acknowledged, however, that petitioner's challenge to the limitations on the authority of the Appeal Board, and her claim that the security-clearance criteria were vague and arbitrary, were properly analyzed as due process claims. Pet. App. A8. Noting that *Webster* v. *Doe*, 486 U.S. at 603-604, had recognized that there may be some judicial review of "colorable" constitutional claims, the court went on to examine whether petitioner's claims rose to the level of being colorable. It concluded that petitioner's due process claims were not colorable because she had no protected liberty or property interest in retaining a security clearance. Pet. App. A10. Because no protected liberty or property interest was implicated by the revocation determination, the court concluded that petitioner's due process claims had been properly dismissed. *Id.* at A12-A13.

ARGUMENT

1. Petitioner renews her contention (Pet. 32-54) that she is entitled to judicial review of the merits of the revocation

of her security clearance. She urges a potpourri of objections to the Department of Defense's underlying decision, including that it was arbitrary, produced by bias, contrary to the evidence, and unsupported by a showing that petitioner has or will fail to safeguard classified information. Pet. 48-50. The court of appeals correctly rejected her invitation to engage in substantive review of the grounds on which her clearance was revoked.[2]

Although there is ordinarily a presumption favoring review of administrative claims, this Court has recognized that the presumption of review "runs aground when it encounters concerns of national security, as in this case, where the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988); see *Webster* v. *Doe*, 486 U.S. 592, 599-600 (1988); *United States Information Agency* v. *Krc*, 905 F.2d 389, 396 (D.C. Cir. 1990). As the Court explained in *Egan*:

> [T]he protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor

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[2] Petitioner continues to characterize these objections as due process claims. But the court of appeals correctly analyzed them, for the most part, as asserting routine administrative objections to the merits of DISCR's decision. Indeed, petitioner inadvertently reveals that point herself through her heavy reliance (Pet. 37-38) on standards drawn from the Administrative Procedure Act (APA).

> can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.

484 U.S. at 529. In *Egan*, those considerations prompted the Court to hold that the Merit Systems Protection Board (MSPB) lacks authority to review the substance of a revocation or denial of a security clearance in the course of reviewing an adverse personnel action. Those considerations apply with equal force to the federal courts, whose authority to review agency action does not extend to security matters that are entrusted to the agency's discretion. See 5 U.S.C. 701(a)(2) (APA review provisions apply "except to the extent that * * * agency action is committed to agency discretion by law"); *Webster* v. *Doe*, *supra* (decision by the CIA to terminate an employee for security reasons is not reviewable under the APA).[3]

As the court of appeals explained, "[w]hen it comes to security matters, a federal court is 'an outside nonexpert body'" that has "no more business reviewing the merits of a decision to grant or revoke a security clearance than does the MSPB." Pet. App. A6. See also *Hill* v. *Department of the Air Force*, 844 F.2d 1407, 1411-1412 (10th Cir.), cert. denied, 488 U.S. 825 (1988). Petitioner seeks (Pet. 51-54) to distinguish *Egan* and *Hill* on the ground that those cases involved federal employees whose challenges to the revocations of their security clearances were not within the jurisdic-

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[3] The Court in *Webster* noted that a claim that an agency failed to comply with its own regulations is ordinarily reviewable under the APA. 486 U.S. at 602 n.7. But the court of appeals properly concluded that petitioner's attempt to fit her case into that mold was unsuccessful. Pet. App. A7 n.1. The regulation that petitioner contended had been breached by the agency was the provision that a security clearance may be continued only if it is "clearly consistent with the national interest." To permit review of a claim that the agency's decision did not square with that requirement would necessarily inject the courts into wholesale review of the merits of the clearance decision.

tion of the MSPB. But *Egan*'s rationale and the traditional limitations on judicial review reflected in the APA foreclose such a distinction. The security-clearance standards for contractor employees and for federal government employees are the same: the agency must be able to make an affirmative determination that access to classified information is "clearly consistent with the national interest." See Exec. Order No. 10,865, § 2, 3 C.F.R. 398, 399 (1959-1963 Comp.) (industrial employees); Exec. Order No. 10,450, §§ 2 and 7, 3 C.F.R. 936, 938 (1949-1953 Comp.) (general standard for federal employees); 32 C.F.R. 155.4 (industrial employees and certain others); 32 C.F.R. 156.3(a) (Department of Defense).

An essential ingredient in that standard, regardless of the status of the person to whom it is applied, is that the agency must exercise judgment and discretion based on a familiarity with the Nation's security requirements and with the level of confidence that is needed to justify entrusting an individual with national secrets. Neither courts nor administrative bodies like the MSPB have the authority to review those determinations. See *Hill*, 844 F.2d at 1411-1412; see also *United States Information Agency* v. *Krc*, 905 F.2d at 395 (analogizing agency decision to withdraw clearance for overseas postings to the Navy's decision in *Egan*). Indeed, the Court in *Egan* bolstered its holding by referring to the principle that "unless Congress specifically has provided otherwise, *courts* traditionally have been reluctant to intrude upon the authority of the Executive [Branch] in military and national security affairs." 484 U.S. at 530 (emphasis added).

In some pre-*Egan* cases, the courts did review the merits of clearance revocations or denials. See *e.g.*, *Gayer* v. *Schlesinger*, 490 F.2d 740 (D.C. Cir. 1973); *McKeand* v. *Laird*, 490 F.2d 1262 (9th Cir. 1973); see also *Adams* v. *Laird*, 420 F.2d 230 (D.C. Cir. 1969), cert. denied, 397 U.S. 1039 (1970). But there is no indication that the D.C.

Circuit would undertake such review today, see *Krc*, 905 F.2d at 395 & n.4. And the decision below demonstrates that *McKeand* is no longer good law in the Ninth Circuit. Pet. App. A6.[4]

2. Petitioner also contends (Pet. 54-57) that she has a right to judicial review on her alleged due process claims because she has a liberty interest in pursuing her chosen profession, and a property interest in her employment at Hughes. Those contentions do not merit this Court's review. The court of appeals stated that *colorable* due process claims stand on a different footing from routine challenges to the merits of a security-clearance revocation. But it correctly held that petitioner does not have even a colorable claim that she was denied a protected liberty or property interest by the agency decision she challenges.[5] Pet. App. A8-A12.

In *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), the Court explained that the requirements of due process do not apply unless government action implicates a protected liberty or property interest. Petitioner, however, can identify no liberty interest in her desire "to practice her

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[4] Petitioner's reliance (Pet. 34) on *Greene* v. *McElroy*, 360 U.S. 474 (1959), is also misplaced; that case held only that there was neither congressional nor presidential authorization for the industrial security clearance program involved in that case, which permitted revocations of clearances without confrontation and cross-examination of adverse witnesses. The Court did not review the *merits* of the security-clearance decision.

[5] Because the court of appeals reviewed petitioner's constitutional claims, but determined that she had not satisfied the threshold requirement for invoking due process, this case is entirely consistent with decisions cited by petitioner as examples of judicial enforcement of constitutional claims. Pet. 57-61, citing *Davis* v. *Passman*, 442 U.S. 228 (1979), *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), and *Butz* v. *Economou*, 438 U.S. 478 (1978).

chosen profession" that is infringed by the decision at issue. The DoD's denial of a clearance does not foreclose her from employment in her profession; it merely restricts her from employment requiring a security clearance. "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains free as before to seek another." *Roth*, 408 U.S. at 575. Nor, for the same reasons, does the DoD's revocation of her security clearance impinge on any protected property interest with respect to petitioner's employment at Hughes. See *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 (1961) (government's denial of access to an employee who worked for a private contractor in a government weapons plant because she failed to meet plant security requirements did not trigger due process protections).

The essential fallacy of petitioner's position is her assumption that her desire for a security clearance is entitled to constitutional protection. But "no one has a 'right' to a security clearance." *Egan*, 484 U.S. at 528. Rather, "[t]he grant of a clearance requires an affirmative act of discretion on the part of the granting official." *Ibid.* Petitioner seeks to sidestep that obstacle by claiming that her desire to pursue her profession and continue employment at Hughes constitute the requisite protected interests; she then contends those interests justify applying the requirements of due process to the underlying government decision on her clearance. If that contention were accepted, it would nullify the principle that a person has no right to a security clearance in the first place. The security-clearance process invariably affects employment opportunities. Petitioner's position would permit private employment arrangements to create constitutionally protected rights with respect to any position requiring a clearance, thus triggering the full panoply of due process protections for the government's security-clearance decisions. That result is incompatible with the constitutional and

prudential considerations that led the Court to recognize that the grant or denial of a security clearance lies within Executive Branch discretion, and is not a matter of private right. *Egan*, 484 U.S. at 529-530.

Greene v. *McElroy* does not require otherwise. There, the Court stated that "the right to hold specific private employment and to follow a chosen profession free from unreasonable government interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment," but the Court was careful to reserve the question whether any incidental interference with an individual's particular employment as a by-product of regulating security clearances is reasonable, such that it "do[es] not constitute [a] deprivation[]" under the Fifth Amendment. 360 U.S. at 492. In *Cafeteria Workers* v. *McElroy*, the Court recognized that *Greene* "did not reach the constitutional issues which that case otherwise would have presented," and went on to hold that due process protections did not attach to the denial of access to a military facility because of security concerns, even though a person's private employment on the facility was affected. 367 U.S. at 889-890, 896-899. Although the Court in *Cafeteria Workers* did not sharply distinguish between the issue whether a protected interest was at stake and the analysis of what process was due, its ultimate holding requires the rejection of petitioner's reliance on her private employment as a basis for applying due process constraints to security clearance decisions.[6]

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[6] Even if petitioner had a protected interest, her due process claims, as identified by the court of appeals (Pet. App. A8), are without merit. Limitations on the Appeal Board's authority to review the hearing examiner's decision, see 32 C.F.R. 155.7(t), do not violate procedural due process. Even for criminal defendants, appellate review is not required, see *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956); there is no requirement for plenary agency appeals of administrative determinations. Petitioner fares no better in arguing (Pet. 25, 49) that the criteria used to make the

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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decision on her clearance were unduly vague. Broad latitude must be accorded to the Executive in framing standards to determine whether a person might compromise the security of sensitive information; petitioner, after all, is not being sent to jail. Cf. *Adams* v. *Laird*, 420 F.2d at 239. Moreover, petitioner's clearance was revoked because she took actions "that indicate poor judgment, unreliability, or untrustworthiness." Pet. App. B3; 32 C.F.R. 155.6(e)(9). Whatever ambiguity there may be at the margins, petitioner's transmission of company sensitive data relating to a defense project to a Bulgarian national serving a life sentence for his role in a hijacking seems to fall comfortably within that standard.

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